

9/12/01

**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 47  
BAC

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

Manna Pro Corporation

v.

O.H. Kruse Grain & Milling Company, and PM Ag Products Incorporated, and Hillman Holdings, Inc., joined as party defendants<sup>1</sup>

Cancellation No. 24,636

Lisa A. Fahien and Andrew B. Mayfield of Armstrong Teasdale LLP for petitioner.

Robert W. Sacoff and Beth A. Fulkerson of Pattishall, McAuliffe, Newbury, Hilliard & Geraldson for respondent.

Before Seeherman, Chapman and Holtzman, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On December 18, 1995 Manna Pro Corporation **filed a petition to cancel Registration No. 1,628,895 on the Principal Register for the mark MANAMILK for "dietary**

---

<sup>1</sup> By Board order dated September 4, 1996, PM Ag Products Incorporated was joined as a party defendant in this case. The records of the Assignment Branch of this Office now indicate that PM Ag Products Incorporated has assigned Registration No. 1,628,895 (involved herein) to Hillman Holdings, Inc. See Reel 2194, Frame 0942. Accordingly, the latter entity is hereby joined as a party defendant.

feed supplements for animals" in International Class 5,  
and "animal feed" in International Class 31.<sup>2</sup>

As grounds for cancellation petitioner alleges that  
it adopted and/or used the mark MANNA for animal feed  
before respondent adopted and/or used the mark MANAMILK  
for dietary feed supplements for animals and animal feed;  
that petitioner is the owner of the following  
registrations:

Registration No. 1,120,141 for MANNA MATE for  
foodstuffs for animals, namely calf and lamb  
feed;<sup>3</sup>

Registration No. 302,619 for the mark shown below

---

<sup>2</sup> Registration No. 1,628,895, issued December 25, 1990. The claimed date of first use for each class is June 20, 1989. The registration includes a claim of ownership of Registration No. 1,113,747. (This claimed registration issued February 20, 1979, and is for the mark MANAMAR for "feeds and feed supplements for animals" in International Class 31, with a claimed date of first use of 1956.)

A Section 9 renewal application and a Section 8 affidavit were due in the involved Registration No. 1,628,895 by no later than June 25, 2001 pursuant to Sections 8(a)(3) and 9(a) of the Trademark Act. There is no indication in the records of the Post Registration Branch of this Office that the renewal and the affidavit of use were filed. The registration has not yet been officially held expired under Section 9 of the Trademark Act.

Because the trial was completed and briefs were filed before June 25, 2001 (i.e., this cancellation proceeding was at a very late stage when the registration putatively expired), the Board will determine this case on the merits. Cf. Trademark Rule 2.134(b) regarding a show cause order to respondent. See also TBMP §602.02(b).

<sup>3</sup> Registration No. 1,120,141, issued June 12, 1979, Section 8 affidavit accepted, Section 15 affidavit acknowledged, renewed. The claimed date of first use is August 31, 1973. Petitioner owns this registration through assignment.

for mixed calf food;<sup>4</sup>

Registration No. 588,509 for MANNA for feed for all farm animals and fowls, namely, feed for stock cattle, dairy cattle, horses, pigs, sheep, goats, rabbits, mink, fox, chinchillas, chickens and turkeys, comprised of grains, concentrates and minerals;<sup>5</sup>

Registration No. 1,406,988 for MANNA PRO for dairy feed;<sup>6</sup>

Registration No. 1,691,827 for the mark shown below

for animal feed;<sup>7</sup>

Registration No. 1,694,713 for CALF-MANNA for animal feed;<sup>8</sup>

Registration No. 1,712,042 for MANNA ELITE for horse feed;<sup>9</sup>

---

<sup>4</sup> Registration No. 302,619, issued April 25, 1933, republished under Section 12(c), Section 8 affidavit accepted, Section 15 affidavit acknowledged, third renewal. The term "calf" is disclaimed. The claimed date of first use is August 11, 1932. Petitioner owns this registration through assignment.

<sup>5</sup> Registration No. 588,509, issued April 20, 1954, Section 8 affidavit accepted, Section 15 affidavit acknowledged, second renewal. The claimed date of first use is August 31, 1950. Petitioner owns this registration through assignment.

<sup>6</sup> Registration No. 1,406,988, issued August 26, 1986, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The claimed date of first use is June 17, 1985. Petitioner owns this registration through assignment.

<sup>7</sup> Registration No. 1,691,827, issued June 9, 1992, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The claimed date of first use is 1981.

<sup>8</sup> Registration No. 1,694,713, issued June 16, 1992, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The claimed date of first use is 1932.

<sup>9</sup> Registration No. 1,712,042, issued September 1, 1992, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The claimed date of first use is 1989.

Cancellation No. 24636

Registration No. 1,783,816 for MANNA E for concentrated microbial supplements for animal feeds;<sup>10</sup>

---

<sup>10</sup> Registration No. 1,783,816, issued July 27, 1993, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The letter "e" is disclaimed. The claimed date of first use is August 1992.

**Cancellation No. 24636**

Registration No. 1,796,736 for SOW-MANNA for swine food supplements;<sup>11</sup> and

Registration No. 2,000,257 for MANNA SENIOR for animal feed;<sup>12</sup>

that petitioner adopted and/or used all of its registered marks before respondent adopted and/or used the mark MANAMILK; that petitioner adopted and/or used the mark MANNA MATE for animal feed before respondent adopted/used the mark MANAMILK for its goods; that petitioner adopted and/or used the mark MANNA PRO as a house mark for a variety of animal and pet foods and food supplements before respondent adopted and/or used the mark MANAMILK for its goods; that petitioner adopted and/or used the mark CALF MANNA before respondent adopted and/or used its mark MANAMILK for its goods; that respondent's mark, MANAMILK, so resembles petitioner's previously used and registered marks, MANNA, MANNA MATE, MANNA PRO and CALF-MANNA, as to be likely, when used in connection with respondent's "pet vitamins" [sic -- dietary feed supplements for animals and animal feed], to cause confusion, mistake or deception under Section 2(d) of the

---

<sup>11</sup> Registration No. 1,796,736, issued October 5, 1993, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The claimed date of first use is October 1, 1991.

<sup>12</sup> In the original pleading, this was pleaded as application Serial No. 74/529,545. Registration No. 2,000,257, issued therefrom on September 10, 1996. The claimed date of first use is January 1993.

Cancellation No. 24636

Trademark Act; and that respondent's registration raises doubts regarding petitioner's ownership of and right to use

the marks MANNA MATE, CALF-MANNA (and design), MANNA PRO, CALF-MANNA, MANNA ELITE, MANNA E, SOW-MANNA, MANNA and MANNA SENIOR.<sup>13</sup>

Respondent, in its answer, denied the salient allegations of the petition to cancel, and raised the affirmative defenses of laches and acquiescence.<sup>14</sup>

Preliminarily, we decide respondent's motion (filed August 11, 1997) to strike certain matters (items I, V, and VI) from petitioner's notice of reliance. Item VI refers to the testimony deposition of William Harrington, which is admissible without a notice of reliance. See Trademark Rule 2.125. A copy of the deposition transcript (with exhibits) was filed in June 2000 and, thus, it is properly of record.

Item V refers to documents produced by respondent during discovery. While these would not generally be admissible through a notice of reliance [see Trademark Rule 2.120(j)(3)(ii)], in this case they were identified

---

<sup>13</sup> While this pleading is not a particularly artful or clear pleading of a "family" of marks, the question of petitioner's "family" of marks was tried, and was briefed by both petitioner and respondent. To whatever extent it may be necessary, the pleadings are considered amended to conform to the evidence on the issue of a "family" of marks. See Fed. R. Civ. P. 15(b).

<sup>14</sup> There was absolutely no discussion of the issues of laches and acquiescence in respondent's brief on the case, and these defenses are therefore considered waived.

and introduced as exhibits at the Harrington deposition.<sup>15</sup> Thus, these documents are properly of record as Exhibit Nos. 12 - 20 of the William Harrington deposition.

Item I in petitioner's notice of reliance is a listing of petitioner's twelve registrations (ten registrations were pleaded by petitioner), and includes a reference to reliance on the USPTO file wrappers thereof. Respondent objected to petitioner's reference to the file histories. Inasmuch as petitioner filed only status and title copies of its registrations, the entire file histories thereof are not in the record.

Respondent also correctly objected on the basis that current status and title copies of the registrations were not attached to the notice of reliance. However, petitioner subsequently filed then-current status and title copies of the twelve registrations, along with petitioner's motion to supplement its notice of reliance for the purpose of submitting the current status and title copies. Petitioner's motion to supplement is granted and, thus, the twelve status and title copies of petitioner's registrations are of record herein, subject

---

<sup>15</sup> The parties' counsel stipulated to the authenticity and genuineness of Exhibit Nos. 12 - 20 at the Harrington deposition (see page 5).



to respondent's further objection to two of the registrations, discussed below.

Respondent specifically objected to two of the twelve registrations, Registration No. 1,056,232 for the mark MILK MATE and Registration No. 2,080,190 for the mark DUCK MANNA, because they were not pleaded by petitioner. While petitioner's pleaded registrations are properly before us, these two registrations, which were neither originally pleaded nor the subject of an amended pleading, subject respondent to undue surprise and prejudice. Thus, respondent's objection is well taken and petitioner's Registration Nos. 1,056,232 and 2,080,190 have not been further considered in our decision herein. See *Hard Rock Cafe Licensing Corp. V. Elsea*, 48 USPQ2d 1400, 1404 (TTAB 1998).

Respondent's motion to strike is granted as to petitioner's two non-pleaded registrations (Nos. 1,056,232 and 2,080,190), and the motion to strike is otherwise denied.

During the deposition of William Harrington, respondent objected to his testimony regarding the unpleaded mark MILK MATE (Registration No. 1,056,232), as well as Exhibit No. 11, which is a feed tag or label for petitioner's MILK MATE product; and respondent renewed

the objection in its brief on the case. Again, because petitioner neither pleaded nor amended its pleading to include this mark, MILK MATE, respondent's objection is sustained. Accordingly, that portion of William Harrington's testimony regarding the mark MILK MATE, as well as Exhibit No. 11 related thereto, have not been considered insofar as petitioner was attempting to add a non-pleaded mark into the issue of likelihood of confusion. However, Exhibit No. 11 (the feed tag) will be considered for the very limited purpose relating to petitioner's claim of a family of marks.

The record consists of the pleadings; the file of the involved registration; the testimony, with exhibits, of William Harrington, petitioner's "vice president, director of the national and international businesses" (limited as explained above); the testimony, with exhibits, of Jerry Wilson, "plant manager, nutritionist" at O.H. Kruse Grain & Milling Company; petitioner's notice of reliance on status and title copies of its twelve registrations (limited to ten registrations as explained above), the file history of respondent's registration, respondent's answers to certain interrogatories, respondent's answers to certain requests for admission, and certain documents produced by

respondent (and introduced as exhibits at the William Harrington deposition); and respondent's notice of reliance on status and title copies of its involved Registration No. 1,628,895 for the mark MANAMILK, and its previous Registration No. 1,113,747 for the mark MANAMAR, and petitioner's answers and objections to respondent's first set of interrogatories.<sup>16</sup>

Both parties filed briefs on the case.<sup>17</sup> An oral hearing was not requested.

Petitioner, Manna Pro Corporation, manufactures and distributes animal feed for a wide variety of animals, including dairy cattle, swine, goats, horses, rabbits, dogs, cats, emus and ostriches. Petitioner and its predecessor have continuously used the mark CALF-MANNA (and design) on mixed calf food since 1932. Mr. Harrington explained that Manna Pro Corporation has more brand identity with CALF-MANNA and it uses that mark to

---

<sup>16</sup> Respondent also submitted with this notice of reliance a copy of its requests for production of documents and a copy of petitioner's responses and objections thereto. Responses to documents requests are not properly made of record by way of a notice of reliance. See TBMP §711, and cases cited therein. However, because petitioner's responses consist virtually only of objections, we have considered these objections as being of record herein.

<sup>17</sup> Petitioner's consented motion (filed July 5, 2001) for leave to file petitioner's reply brief, effective November 13, 2000, is granted.

launch other products identified by MANNA marks (e.g., MANNA ELITE, MANNA SENIOR). (Dep., p. 40.)

Petitioner and its predecessors have used the mark CALF-MANNA on animal feed since 1932; the marks MANNA and MANNA MATE since at least as early as 1979; and the mark MANNA PRO since 1985. Petitioner has used the mark MANNA ELITE since 1989; the mark SOW-MANNA since 1991; the mark MANNA E since 1992; and the mark MANNA SENIOR since 1993.

Petitioner's products are sold nationwide to livestock owners and breeders, dairy farmers, and a broad spectrum of the livestock industry. It promotes its goods sold under the Manna Pro Corporation marks through feeder meetings, and brochures and advertisements done in conjunction with petitioner's distributors and dealers. The goods are sold through feed dealers, farm store chains, feed distributors, large retail chain stores, and sometimes directly to end product users.

Respondent manufactures animal feed for all types of animals, including dairy cattle, poultry, horses, zoo animals, and canaries. Respondent is involved in the wholesale and retail sales of animal feed. In fact, O.H. Kruse Grain & Milling Company (Kruse) has continuously been a distributor for Manna Pro Corporation since around

1988 (and was a distributor for petitioner's predecessor). Kruse sells petitioner's CALF-MANNA product at its stores, and has sometimes sold petitioner's milk replacer product as well as some of petitioner's pet foods and horse feed.

The product sold under respondent's MANAMILK mark is "a milk-based supplement for young animals" (Wilson Dep., p. 29.) Respondent does not manufacture this product, rather it is custom manufactured for respondent. The involved mark MANAMILK has been used by respondent since 1989. Although respondent's other products are distributed in Hawaii, central and southern California, parts of Arizona, Idaho and Nevada (Wilson Dep., p. 24), Mr. Wilson was unaware of any sales of the MANAMILK product outside of California, with the exception of one out-of-state invoice which he saw when respondent applied to register the mark. (Wilson, Dep., pp. 67 and 77.)

Respondent's main customers are commercial feeders such as dairies, poultry farms and horse farms; but it also sells to pet shops, feed stores, and to jobbers who distribute the products. Respondent advertises and promotes its products, including its MANAMILK supplement, through the sales staff in the field, literature/brochures, and at fairs.

**Cancellation No. 24636**

In a cancellation proceeding, even if the petitioner owns a registration, priority must be proven. A petitioner, relying on registration(s) of its pleaded mark(s), is entitled to rely on the filing date(s) of the application(s) which matured into the registration(s) as evidence of use of its mark(s). See *Henry Siegel Co. v. M & R International Mfg. Co.*, 4 USPQ2d 1154, footnote 9 (TTAB 1987). The testimony establishes petitioner's priority of use (through predecessors) of its registered marks CALF-MANNA since 1932 (with the filing date of the application which matured into Registration No. 302,619 being November 3, 1932); MANNA since 1979 (with the filing date of the application which matured into Registration No. 588,509 being September 25, 1950); MANNA MATE since 1979 (with the filing date of the application which matured into Registration No. 1,120,141 being July 12, 1978); and MANNA PRO since 1985 (with the filing date of the application which matured into Registration No. 1,406,988 being January 22, 1986). All of the above-named marks were used by petitioner prior to respondent's first use in June 1989 (the filing date of its underlying application being September 11, 1989). Thus, petitioner has established priority.

We turn then to the issue of likelihood of confusion. Our determination of this issue is based on our analysis of all the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Turning first to the marks, the Board must consider the similarity or dissimilarity of the marks in sound, appearance, connotation and commercial impression. See 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §§23:20 and 23:20.1 (4th ed. 2001).

We initially address petitioner's claim of a family of "MANNA" marks. In its brief (p. 12), petitioner contends that its "registrations establish that Manna Pro owned a family of "MANNA" marks, both before and after the filing of the MANAMILK application."<sup>18</sup> Aside from the ten registrations, petitioner's evidence of a "family" of "MANNA" marks essentially consists of (i) a small folded paper box which is to be used as a feed scoop enclosed within bags of animal feed, and on which the marks MANNA PRO and CALF-MANNA appear in large, colorful lettering, and the

---

<sup>18</sup> Petitioner had submitted status and title copies of twelve registrations of various "MANNA" marks, two of which have been excluded from consideration.

**Cancellation No. 24636**

mark MANNA MATE appears in small, plain type within the text (paragraph 5) of the calf feeding directions listed on the side panel of the box; and (ii) a feed tag used on petitioner's MILK MATE product (Exhibit No. 11--which has otherwise been excluded from consideration), on which the marks MANNA PRO and CALF-MANNA appear in large, black lettering, and the mark MANNA MATE appears in smaller type on the reverse side of the feed tag. These two exhibits both show use of the words "The Calf-Manna Company," the marks MANNA PRO, MANNA MATE, and CALF-MANNA, as well as petitioner's corporate name, Manna Pro Corporation.

It is well settled that mere adoption, use and registration of a number of marks having a common feature (e.g., MANNA) for similar or related goods or services does not in and of itself establish a family of marks. Rather, in order to establish a family of marks, it must be demonstrated that the marks asserted to comprise the "family," or a number of them, have been used and advertised in promotional material or used in everyday sales activities in such a manner as to create common exposure and thereafter recognition of common ownership based upon a feature common



**Cancellation No. 24636**

to each mark. See J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); Witco

Chemical Co. v. Whitfield Chemical Co., 418 F.2d 403, 164 USPQ 43 (CCPA 1969); and Hester Industries Inc. v. Tyson Foods Inc., 2 USPQ2d 1646 (TTAB 1987).

In this case, petitioner's argument that the registrations alone establish a "family" of marks is legally incorrect. Moreover, this record contains no clear evidence that either the feed tag (Exhibit No. 11) or the folded paper box scoop (Exhibit 21) were distributed and used prior to respondent's first use date in June 1989 to show that petitioner was promoting a family of marks. In addition, the folded paper box scoop is enclosed within the package of animal feed, and is not seen by purchasers until after they purchase and then open the bag. Finally, the mark MANNA MATE is hidden within the text of the feeding directions, and is not likely to be noticed by consumers. All of these factors do not leave an impression of a family of marks. Viewing the totality of petitioner's evidence regarding its asserted "family" of "MANNA" marks, the record before the Board is not sufficient to prove that petitioner has used and promoted its marks in a manner resulting in public

recognition of MANNA as a family "surname" such that the various MANNA marks would be assumed to have a common origin.

We turn next to a consideration of petitioner's individual "MANNA" marks. The petition to cancel specifically references that petitioner adopted, used, applied to register or registered the marks MANNA MATE, MANNA, MANNA PRO, CALF-MANNA, MANNA ELITE, MANNA E, SOW-MANNA, and MANNA SENIOR, prior to respondent's adoption of its mark MANAMILK. However, in its brief, petitioner frames the issue before the Board as whether there is a likelihood of confusion between respondent's mark and petitioner's "registered marks CALF-MANNA (and Design), MANNA, MANNA PRO, MANNA MATE, and MILK MATE, all of which were registered prior to the first use and filing date of Respondents' MANAMILK mark, and [petitioner's] common law mark CALF-MANNA, which [petitioner] and its predecessors have used since 1932." (Brief, p. 4.) Moreover, the record establishes petitioner's priority only as to the marks MANNA MATE, MANNA, MANNA PRO and CALF-MANNA (and design). Thus, we consider the issue of likelihood of confusion with regard to petitioner's individual marks, CALF-MANNA (and design), MANNA, MANNA PRO, MANNA MATE, and CALF-MANNA.

Of these marks, we consider petitioner's MANNA mark to be the closest of petitioner's marks to respondent's MANAMILK mark. Therefore, we will focus our discussion of the similarity or dissimilarities between the marks on petitioner's MANNA mark.

It is obvious that there are some differences, namely, that respondent's mark includes the word "MILK"; that respondent's mark is three syllables while petitioner's is two syllables; and that there are two "N"s in petitioner's mark but only one "N" in respondent's mark. These differences, however, do not serve to distinguish the marks. Purchasers are unlikely to remember the specific differences due to the recollection of the average purchaser, who retains a general, rather than a specific, impression of the many trademarks encountered. That is, the purchaser's fallibility of memory over a period of time must be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd* (Fed. Cir., June 5, 1992).

Moreover, it is generally the first part of a mark which is most likely to be impressed upon the mind of a purchaser and be remembered by the purchaser. See *Presto*

Products Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895, 1897 (TTAB 1988). In this case, respondent's mark is MANAMILK, the first two syllables of which sound like petitioner's mark, MANNA. Also, because respondent's mark is for a milk-based product, MANA is the dominant part of the mark. These realities play a major part in creating the similarity of the overall commercial impression of these marks.

There is no evidence of record as to any specific meaning or connotation of the "MANA" portion of respondent's mark.<sup>19</sup> Respondent, arguing that the MANNA/MANA portions of the respective marks differ in connotation, requested that the Board take judicial notice of the meaning of "MANNA." That request is granted, and we note that The American Heritage Dictionary (1976) defines "manna" as "n. 1. The food miraculously provided for the Israelites in the wilderness during their flight from Egypt. Exodus 16:14-36. 2. Any spiritual nourishment of divine origin...." Although MANNA has a definition, and there is not a specific connotation of the letters "MANA," we are not

---

<sup>19</sup> Respondent's witness (Jerry Wilson) did explain why its previous mark MANAMAR was chosen, which related to the fact that respondent once distributed Manamar company's product, and when the Manamar company went out of business respondent began to produce the MANAMAR product. (Wilson, Dep., p. 49.)

convinced that purchasers will even notice the difference of one "N" in the marks; rather, they are likely to remember respondent's mark as the familiar spelling "manna." Thus, the "mana" portion of respondent's mark would have the same connotation as plaintiff's mark. The additional word "MILK" in respondent's mark, with its highly descriptive connotation for a milk-based supplement, does little to distinguish respondent's mark from petitioner's MANNA mark.

Accordingly, we find petitioner's MANNA mark and respondent's MANAMILK mark, when considered in their entireties, are similar in sound, appearance, connotation and commercial impression.

Respondent's reliance on the case of *Ex parte Albers Milling Company*, 99 USPQ 419 (Comm. 1953) is not persuasive.

In that case, petitioner's predecessor sought a reversal of the examiner's refusal to register the mark MANNA in view of the registered mark . The Commissioner determined that for purposes of determining likelihood of confusion, the registered mark, consisting of an arbitrary association of letters and a design, could not be dissected, but must be considered as a whole, and the examiner was reversed. (This application matured into

the present petitioner's Registration No. 588,509 for the mark MANNA.) In the case now before us the third syllable of respondent's mark will be recognized as the common English word, "milk," rather than an arbitrary association of letters and a design.

Turning next to a consideration of the similarities and dissimilarities of the parties' goods, there is no doubt that petitioner's animal feed and respondent's animal feed and dietary supplements for animals are identical or closely related. Respondent's goods are identified as "dietary feed supplements for animals" and "animal feed," while petitioner's goods sold under the MANNA mark are identified as "feed for all farm animals and fowls, namely, feed for stock cattle, dairy cattle, horses, pigs, sheep, goats, rabbits, mink, fox, chinchillas, chickens and turkeys, comprised of grains, concentrates and minerals."

Respondent's arguments that only petitioner's CALF-MANNA product competes with respondent's MANAMILK product; and that petitioner's "[other products] are used in different stages in the animals' lives" (brief, p. 11) are unpersuasive. It has been repeatedly held that, when evaluating the issue of likelihood of confusion in Board proceedings regarding the registrability of marks, the

Board is constrained to compare the goods (or services) as identified in the application with the goods (or services) as identified in the registration(s). See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

The record is clear that both parties' goods are sold through some of the same or overlapping channels of trade to the same purchasers. Respondent acknowledges that the trade channels are similar (differing only in that petitioner sells to large retail chain stores, whereas respondent does not). (Brief, p. 12.) In fact, respondent is a distributor for petitioner's goods, and offers for sale both its own products and some of petitioner's involved goods.

Petitioner argues that its marks are "well-known and strong" (brief, p. 12). However, the record simply does not support that argument. Thus, this du Pont factor does not weigh in petitioner's favor.

Respondent argues that confusion is not likely as evidenced by the fact there has been no actual confusion despite concurrent use for eight years, especially in

light of the similar trade channels. We are not persuaded by respondent's argument. Proof of actual confusion is not necessary. Rather, the test is likelihood of confusion. See Kangol Ltd. V. KangaROOS U.S.A. Inc., 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992). Moreover, evidence of actual confusion is difficult to obtain. In this case, the record shows that respondent's sales of its MANAMILK product have been limited to California, and there is no indication of the volume of sales. In these circumstances, we cannot conclude that the lack of evidence of actual confusion shows that confusion is not likely to occur.

We find that, based upon a consideration of all relevant du Pont factors, confusion as to source is likely between respondent's MANAMILK mark and petitioner's previously used and registered MANNA mark, when these marks are used in connection with the essentially identical goods offered by these parties.

Having found that there exists a likelihood of confusion resulting from the contemporaneous use of respondents' marks MANAMILK on animal feed and dietary feed supplements for animals and petitioner's mark MANNA on feed for all farm animals and fowls, we elect not to consider the remainder of petitioner's Section 2(d) claim



**Cancellation No. 24636**

as to its other individual marks for which petitioner established priority, specifically, CALF-MANNA (and design), MANNA PRO and MANNA MATE, or petitioner's claim of prior common law rights in the mark CALF-MANNA. See American Paging Inc. v. American Mobilphone Inc., 13 USPQ2d 2036, 2039 (TTAB 1989), aff'd 17 USPQ2d 1726 (Fed. Cir. 1990)(unpublished); and Goldring, Inc. v. Towncliffe, Inc., 234 F.2d 265, 110 USPQ 284, 285 (CCPA 1956).

**Decision:** The petition to cancel is granted and Registration No. 1,628,895 will be cancelled in due course. (If the records of this Office officially indicate the registration has expired under Section 9 of the Trademark Act, then the Director will not issue a separate cancellation order.)